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Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–455 OF 2007
JAMES FOONG, WAN ADNAN MUHAMMAD AND SULONG MATJERAIE JJCA
13 APRIL 2009

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Land Law — Restraint on dealings — Caveat — Caveatable interest — Land development agreement between registered proprietor and developer terminated by registered proprietor — Developer seeking specific performance — Whether development agreement conferred developer any caveatable interest — Whether developer's caveat should remain — Onus of proving caveatable interest

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The appellant/plaintiff as the registered proprietor of a piece of land ('the said land') entered into a development agreement ('development agreement') with the respondent/defendant for the development of the said land. It was envisaged under the development agreement that residential and commercial buildings will be constructed on various subdivided sublots thereon. The development agreement conferred, on a sharing basis, the appellant with 20% of the residential and commercial buildings while the respondent was to retain the remaining 80% of the said buildings. Pursuant to authority granted by cl 17(1) of the development agreement, the respondent lodged a caveat against the said land. Disputes arose between the parties culminating in the termination of the development agreement and resulting in the respondent commencing a writ action for specific performance against the appellant. The said writ action was still pending before the High Court. The appellant, vide an originating summons applied for an order for the removal of caveat under s 177 of the Sarawak Land Code ('the Code'). The learned High Court judge dismissed the application and hence this appeal. The issue arising in the appeal was whether the development agreement conferred onto the respondent beneficial interest in the said land to sustain the caveat. Learned counsel for the appellant argued that since the development agreement had been terminated the respondent ceased to have any more beneficial interest over the land to sustain the caveat.

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Held, dismissing the appeal with costs:

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(1) Applying the test in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, the onus was upon the respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property placed under caveat did raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it

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would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party (see para 23).

(2) There was merit in the finding of the learned High Court judge that the entitlement of 80% of the subdivided lots of the said land constituted the respondent beneficial interest in the said land because of the words 'by virtue of any unregistered agreement of other instrument' appearing in s 173 of the Code are wide enough to encompass the development agreement (see para 25).

(3) The respondent succeeded in discharging the onus placed in satisfying the court of its claim to a caveatable interest in the said land and consequently raised a serious question to be tried. On the balance of convenience the caveat should remain intact to maintain a status quo pending the outcome of the hearing under appeal (see para 27).

[Bahasa Malaysia summary

Perayu/plaintif sebagai pemilik berdaftar sebidang tanah ('tanah tersebut') memasuki perjanjian pembangunan ('perjanjian pembangunan') dengan responden/defendan untuk pembangunan tanah tersebut. Ia dibayangkan di bawah perjanjian pembangunan tersebut bahawa bangunan-bangunan kediaman dan perdagangan akan dibina atas pelbagai sublot yang dibahagikan di atasnya. Perjanjian pembangunan dibenarkan, atas asas berkongsi, perayu memegang syer 20% daripada bangunan-bangunan kediaman dan perdagangan sementara responden memegang syer 80% yang tinggal daripada bangunan-bangunan tersebut. Berikutan autoriti yang diberikan oleh klausa 17(1) perjanjian pembangunan, responden memasukkan kaveat terhadap tanah tersebut. Pertikaian berbangkit di antara pihak-pihak menyebabkan penamatan perjanjian pembangunan dan mengakibatkan responden memulakan tindakan writ untuk pelaksanaan spesifik terhadap perayu. Tindakan writ tersebut masih belum didengar di hadapan Mahkamah Tinggi. Perayu melalui saman pemula memohon untuk perintah pemotongan kaveat di bawah s 177 Kanun Tanah Sarawak ('Kanun'). Hakim Mahkamah Tinggi menolak permohonan dan maka rayuan ini. Isu yang berbangkit di dalam rayuan adalah sama ada perjanjian pembangunan memberikan kepada responden kepentingan benefisial di dalam tanah tersebut untuk mengekalkan kaveat tersebut. Peguam yang bijaksana untuk perayu berhujah bahawa memandangkan perjanjian pembangunan telah ditamatkan responden berhenti daripada mempunyai apa-apa lagi kepentingan benefisial terhadap tanah tersebut untuk mengekalkan kaveat.

Diputuskan, menolak rayuan dengan kos:

(1) Menggunapakai ujian dalam kes *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, beban adalah di atas responden, sebagai pengkaveat

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untuk memuaskan mahkamah bahawa atas keterangan yang dikemukakan kepadanya tuntutan responden kepada kepentingan di dalam hartanah yang dikenakan kaveat memang membangkitkan soalan serius untuk dibicarakan; dan sesudah berbuat demikian, dia mesti menunjukkan seterusnya bahawa atas imbangan kesenangan adalah lebih baik untuk mengekalkan status quo sehingga perbicaraan tindakan dengan menghalang penanggung kaveat daripada melepaskan tanahnya kepada pihak ketiga (lihat perenggan 23).

(2) Terdapat merit dalam dapatan hakim Mahkamah Tinggi bahawa hak 80% dalam lot-lot tanah yang dibahagikan membentuk kepentingan benefisial responden dalam tanah tersebut kerana perkataan-perkataan 'by virtue of any unregistered agreement of other instrument' terdapat dalam s 173 Kanun adalah luas untuk merangkumi perjanjian pembangunan (lihat perenggan 25).

(3) Responden berjaya dalam melepaskan beban yang dikenakan dalam memuaskan mahkamah mengenai tuntutannya kepada kepentingan kaveat dalam tanah tersebut dan akibatnya membangkitkan soalan serius untuk dibicarakan. Atas imbangan kesenangan kaveat patut kekal tidak terjejas untuk mengekalkan status quo sementara menunggu keputusan pendengaran di bawah rayuan (lihat perenggan 27).]

Notes:

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3990–4398.

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (folld)
Mohamed Bin Oki & Anor v Lau Hieng Ming & Ors [1981] 2 MLJ 88, HC (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Legislation referred to

National Land Code s 327
Sarawak Land Code (Cap 81) ss 173, 177

Tan Choi Yu (Tang & Tang) for the appellant.
George Lim (Battenberg & Talma) for the respondent.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This is an appeal against the decision of the learned High Court Judge at

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Sibu, Sarawak who had dismissed, with costs, the originating summons of the appellant/plaintiff (appellant) for an order for the removal of caveat under s 177 of the Sarawak Land Code (Cap 81). We agreed with and affirmed the decision of the learned High Court judge and have accordingly dismissed the appeal. Our reasons are as follows.

BRIEF FACTS

[3] The appellant, being the registered proprietor of all that parcel of land situate at Sungai Seduan Sibu, containing an area of 22.983 hectares, more or less and described as Lot 1382 Block 11, Seduan Land District ('the said land'), entered into a development agreement ('development agreement') with the respondent/defendant ('respondent') on 9 May 1998 for the development of the said land. The respondent was formerly known as Vicspeed Sdn Bhd.

[4] It was envisaged under the development agreement that residential and commercial buildings will be constructed on various subdivided sublots thereon.

[5] The development agreement confers, on a sharing basis, the appellant with 20% of the residential and commercial buildings approved by the authorities while the respondent shall retain the remaining 80% of the said buildings.

[6] Clause 17(1) of the development agreement confers the right of the respondent to lodge a caveat against the said land. Accordingly, the respondent lodged a caveat at the Sibu Land Registry Office on 23 June 1998 vide Instrument No L6318/1998 ('the caveat').

[7] Disputes arose between the parties hereto culminating in the termination of the development agreement and resulting in the respondent taking writ action ('writ action') for specific performance against the appellant. The said writ action is still pending before the High Court in Sibu, Sarawak.

ISSUE BEFORE THIS COURT

[8] Whether the development agreement confers onto the respondent beneficial interest in the said land to sustain the caveat?

DECISION OF LEARNED HIGH COURT JUDGE

[9] The learned High Court judge was satisfied that the respondent had successfully established a serious question to be tried and concluded that the

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balance of convenience laid in maintaining status quo to prevent, inter alia, scuttling the prospect of the respondent's pending writ action for specific performance.

THE APPELLANT'S CONTENTION

[10] Learned counsel for the appellant argued that since the development agreement has been terminated the respondent ceased to have any more beneficial interest over the land to sustain the caveat.

[11] He argued that the development agreement stipulates that the respondent shall apply for and obtain approval in principle in writing for the subdivision of the said land within a period of 24 months from the date of the agreement which was 9 May 1998. Therefore such approval in principle should have been obtained by 9 May 2000.

[12] It was further argued that in the event that approval cannot be obtained within the stipulated 24 months period, then the development agreement, the power of attorney shall ipso facto lapse and be determined. The caveat shall also be withdrawn by the respondent at its own costs.

[13] Learned counsel for the appellant alleged that no such approval was forthcoming within the 24 months period. He conceded however that there was a letter dated 5 May 2000 from Jabatan Tanah dan Survei, Bahagaian Sibu, Sarawak (Lands and Surveys Department, Sibu, Sarawak) at p 178 of the record of appeal but contended that approval was never obtained. It was a mere invitation to treat.

[14] This court notes however that the said letter seems to offer provisional approval for a period of three (3) months subject to payment of specified fees.

[15] It was also the contention of learned counsel for the appellant that this was a contractual interest provided for under the development agreement. He argued that once the respondent cannot perform and comply with paras 3(1) and 3(2) of the development agreement, para 3(3) shall apply.

[16] For easy reference para 3(1) of the development agreement provides as follows:

> The Developer shall apply for and obtain the approval in principle in writing for the subdivision of the said land within a period of twenty-four (24) months from the date of this Agreement.

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[17] Paragraph 3(2) of the same provides:

> This Agreement and the Power of Attorney shall ipso facto lapse and be determined in the event that the Developer shall fail to obtain the approval in principle in writing for the subdivision of the said land within the said 24 months.

[18] Paragraph 3(3) provides:

> In the event the Agreement and the Power of Attorney are determined as provided in clause 3(1) and (2) hereof, the Developer shall at its own costs and expenses forthwith revoke the Power of Attorney and withdraw any caveat in respect of the said land …

[19] Based on the above, it was therefore the contention of learned counsel for the appellant that applying para 3(3) of the development agreement the respondent should have withdrawn the caveat and revoked the power of attorney when it failed to comply with para 3(1) of the development agreement.

THE RESPONDENT'S CONTENTION

[20] Learned counsel for the respondent on the other hand argued that the development agreement conferred beneficial interest in the said land on the respondent because of the 'sharing basis' arising from the allocation of 20% of the sublots approved for the appellant and the remaining 80% to the respondent.

[21] As a result of the termination of the development agreement, it was argued that there was a genuine dispute culminating in the respondent taking a writ action for specific performance. This action is still pending before the High Court and as such it was argued that this court need only be satisfied, at this stage of the proceeding, that the respondent had shown that it had an interest in the said land to preserve the caveat and on a balance of convenience status quo be maintained until the trial of the writ action.

DECISION OF THE COURT

[22] In *Mohamed Bin Oki & Anor v Lau Hieng Ming & Ors* [1981] 2 MLJ 88 (HC), learned Tan Chiaw Thong J was of the view that the decisions in *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 and *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 involving applications made under s 327 of the National Land Code are applicable to applications made under s 177 of the Sarawak Land Code (Cap 81). This is because it was his view that the provisions of s 327 of the National Land Code are

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substantially similar to those in s 177 of the Sarawak Land Code (Cap 81). With respect we share his learned view. Indeed this instant application is made under s 177 of the Sarawak Land Code (Cap 81).

[23] Applying the test in *Eng Mee Yong's* case, the onus is upon the respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property placed under caveat does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party.

[24] Additionally it is pertinent at this stage to consider the provisions of s 173 of the Sarawak Land Code (Cap 81) which deals with 'Caveat against dealing'. Section 173 stipulates:

> 173 Any person —
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or any transmission, or of any trust express or implied or otherwise howsoever, …
>
> (b) ...
>
> (c) ...
>
> may at any time lodge with the Registrar a caveat in Form O in the First Schedule

[25] Therefore it is the considered view of this court that there is merit in the finding of the learned High Court judge that the entitlement of 80% of the subdivided lots of the said land constitutes the respondent beneficial interest in the said land because of the words 'by virtue of any unregistered agreement of other instrument' appearing in s 173 thereof are wide enough to encompass the development agreement.

[26] We are equally satisfied that the respondent had successfully established a serious question to be tried. Further we are also of the considered view that the conflicting affidavits relating to the various issues raised by the appellant pertaining to time frames and proposition based on lapse and effluxion of time to sustain their assertion that the development agreement had lapsed and was no longer subsisting ought to be tried and should not be disposed of simply by way of affidavit evidence.

[27] For the reasons stated, we hold that the respondent has succeeded in discharging the onus placed in satisfying this court of its claim to a caveatable interest in the said land and consequently raised a serious question to be tried.

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A We have read and re-read the grounds of decision of the learned High Court judge and there is nothing to show that there was any error in law and does not therefore warrant interference.

B **[28]** We find that there is a serious question to be tried and on the balance of convenience we are of the opinion that the caveat should remain intact to maintain a status quo pending the outcome of the hearing under Appeal No 22–05 of 2001 at the High Court in Sibu, Sarawak which will be heard very soon. This appeal is dismissed with costs. Deposit to the respondent towards account of taxed costs.

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Appeal dismissed with costs.

Reported by Kanesh Sundrum

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